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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91187908
Party	Defendant Super Bakery, Incorporated
Correspondence Address	David G. Oberdick Meyer, Unkovic & Scott LLP 535 Smithfield Street, Suite 1300 Pittsburgh, PA 15222 UNITED STATES dgo@muslaw.com, tma@muslaw.com
Submission	Opposition/Response to Motion
Filer's Name	David G. Oberdick
Filer's e-mail	dgo@muslaw.com, tma@muslaw.com
Signature	/David G. Oberdick/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

OKLAHOMA STATE UNIVERSITY,	)	Opposition No. 91187908
	)	
Opposer,	)	Application No. 77/383,001
	)	
v.	)	Mark: COWBOYADE
	)	
SUPER BAKERY, INCORPORATED,	)	
	)	
Applicant.	)	

**APPLICANT’S BRIEF OPPOSING SUMMARY JUDGMENT**

Applicant Super Bakery, Incorporated (“Applicant”) submits its response to University of Georgia Athletic Association, Inc.’s (“Opposer”) motion for summary judgment pursuant to Rule 2.127(e)(1) of the Trademark Rules of Practice and Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, Applicant respectfully requests the Board to deny Opposer’s motion for summary judgment.

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## I. Introduction

Applicant, Super Bakery, Inc. is attempting to build upon the success of its existing sales and marketing efforts in K-12, hospital and military channels by expanding its inventory to include nutrient-rich sports drinks. Applicant has filed trademark applications for several marks which combine commonplace names, places, and nationalities with the suffix “ADE” in order to form marks such as COWBOYADE in connection with its sports drinks. In opposing these registrations, the Oklahoma State University and its principal licensee, the Collegiate Licensing Company, have significantly overstated the scope of the University’s rights in the word “cowboy(s)”. Opposer asserts that its use of a cowboy mascot and the licensing of its marks establish rights beyond the scope of federal trademark law that equate to a proprietary interest in the word “cowboy” itself. When the pertinent *du Pont* factors are properly assessed, is clear that the scope of Opposer’s rights is far narrower. At minimum, genuine issues of material fact remain with respect to each of the *du Pont* factors cited by Opposer.

Not only has Opposer failed to plead the ownership of any federal registrations for “cowboys”, it has also failed to establish as a matter of law that consumers are likely to perceive that COWBOYADE is licensed from or endorsed by Opposer. Neither has Opposer produced or licensed the production of sports drinks under any of its marks. To the contrary, the evidence in this proceeding indicates that Opposer is **precluded** from doing so by covenants or obligations to third parties. Accordingly, Opposer is unlikely, now or in the future, to enter the Applicant’s intended channel of trade.

Moreover, the overall commercial impression of Opposer’s marks differs significantly from that of COWBOYADE. Almost universally, officially licensed products bear the mark of the licensee/producer and a seal of authenticity from the Collegiate Licensing Company. In fact, the latter has gone to great lengths to ensure that ordinary consumers recognize authentic licensed goods upon sight. As such, an ordinary consumer encountering the proposed COWBOYADE mark absent

any other indicia of the Opposer or its principal licensee would have no cause to associate Applicant's sports drink with the Opposer simply because it includes the ubiquitous "Cowboy" mascot name. Indeed, the evidence indicates that patrons of Opposer's products are scrutinizing purchasers and not easily confused.

Opposer asserts that its institution of higher learning, sports teams, and licensed products are so recognized among the general public as to be famous<sup>1</sup>; however, the evidence indicates that any recognition of the Opposer via its marks occurs only when the word "cowboys" is used in combination with indicia of the University. Almost without exception, the only way one ever associates "cowboys" with the University is if the word is accompanied by at least one of the following additional identifiers: the University's color pair, the name of the University, the stylized initials "OSU", and/or depictions or illustrations of Pistol Pete, a cowboy caricature. Accordingly, while the Opposer's sports team may be the subject of media coverage, Opposer has failed to demonstrate that "cowboys", in isolation, is recognized by ordinary consumers as identifying the University. Indeed, "cowboys" is perhaps one of the most ubiquitous mascot names in American sports culture, as Opposer readily acknowledges. See Opposer's Response to Applicant's First Request for Admissions (Pritchard Dec. Ex. F at ¶¶ 2-7). In view of this widespread third-party use of "cowboys" as a mascot or trademark or both, it is readily apparent that no single entity has – or can have – exclusive rights to "cowboys" so as to preclude all use of that word in connection with goods such as Applicant's sports drink.

Lastly, Opposer has entirely misrepresented the Applicant's intent in filing its COWBOYADE application. As would be the case with any product sold to ordinary consumers in the national market, there may be some overlap between the respective parties' customer bases; however, the weight of the evidence indicates that Applicant does not intend to capture or trade on

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<sup>1</sup> Opposer has produced no survey, nor even identified any expert who might substantiate Opposer's broad contentions in this regard.



the goodwill of the Opposer.

In deposition, Franco Harris, President of Super Bakery, testified that Applicant has significant and existing sales in the K-12 school system throughout the country, many of which have mascots. Applicant is also the owner of a federal registration for LIONADE covering a “nutritionally fortified drink, namely, protein recovery shake.” Applicant has further testified that it will respect the particular color pairs of Opposer, in connection with labels that incorporate its proposed COWBOYADE and other “MascotADE” marks, and that it will not target the most relevant market for Opposer, namely university campuses. The evidence clearly shows that Applicant filed its COWBOYADE and other “MascotADE” applications to capitalize on Applicant’s own existing sales and marketing channels, and that Applicant intends to avoid trading on the goodwill of the Opposer. A reasonable trier of fact could only conclude that Applicant lacked the intent to trade on the reputation of the University.

For these reasons, and others discussed in more detail below, Opposer’s Motion for Summary Judgment should be denied.

## **II. Statement of Facts**

A. Super Bakery, Inc. Franco Harris (“Harris”) is the principal owner and CEO of Super Bakery, Inc. (“Super Bakery” or “SBI”), a producer of nutritional bakery products including doughnuts and cinnamon buns. Throughout his tenure as a businessman, Harris has maintained an emphasis on providing healthy, natural food products as an alternative to foods commonly found in institutional channels that are higher in fat content and contain numerous chemical preservatives.

Super Bakery’s primary customer base includes K-12 schools throughout the U.S., the federally-funded pre-K Head Start Program, health care institutions, and the U.S. Military. Sales of SBI’s products are accomplished via regional sales representatives that interface directly with individual school and health care systems or with regional distributors. Potential customers are directed to a password-protected website where SBI’s inventory is catalogued. After establishing an

account, institutions and distributors may make purchase orders through the website. This website is SBI's sole distribution channel and is not accessible to end users or ordinary consumers who do not have an account with SBI.

Until recently, SBI's products were limited to frozen goods — nutritional bakery products such as donuts, organic breads, cinnamon buns, and the like. Perceiving an opportunity in the national market for sports drinks, however, SBI decided to launch a liquid division. This decision was motivated in part because of SBI's collaboration with Pennsylvania State University's ("Penn State" or "PSU") food science lab. Professor Bordi, a PhD researcher at the PSU food science lab and an acquaintance of Harris', developed a cocoa-based sports drink ("the sports drink") that was fortified with additional nutrients and minerals. SBI obtained an unopposed federal trademark registration for LIONADE in January, 2005. Harris and SBI saw the product's national potential and decided to market it under the brand LIONADE because they felt consumers would respond positively to the LIONADE brand, whether they were supporters of the Penn State Nittany Lions or not.

SBI more recently developed another beverage that has been sold in limited quantities to restaurants and convenience stores in the Pittsburgh area: Calcium 2 0. A third product in development by SBI, which forms the basis of the present dispute, attempts to build on the success of the original sports drink and Calcium 2 0. Like its predecessors, this third product will be a nutrient-rich sports drink and is being developed for nationwide distribution. Because SBI's primary market is K-12 schools, Harris decided to market the sports drink by selecting identifiable names, places, and nationalities, and attaching to them the suffix "-ADE" in order to obtain a series of appealing brand names. *See* Pritchard Dec. Ex. D Harris Dep., pp. 8-15, 24; Ralls Dec. Ex. G, attached to Opposer's brief, Harris Dep., pp. 29 and 31-32.

B. Oklahoma State University

The University has used the word “cowboys” in connection with intercollegiate sports, and sports apparel markets. The word “cowboys” is apparently also licensed for use on a variety of promotional materials intended for fans, students, and alumni of the University. It appears in combination with the University’s distinguishing indicia: its distinctive orange-and-black color scheme, the words “Oklahoma State”, “OSU” or “O State”, and/or a photograph or illustration of Pistol Pete.

On licensed products, the University’s marks almost always appear in combination with marks identifying the producer or manufacturer of the goods. In these instances, the word “cowboys” as well as the registered University marks do not appear to perform a source-identifying function. In many cases, the Collegiate Licensing Company (“CLC”) logo also appears on the goods’ packaging, further identifying the products as officially licensed.

Finally, the University has evaded responding to Applicant’s interrogatories regarding the existence of an exclusivity agreement between the University and nationally recognized sports drink manufacturers. See Pritchard Dec. Ex. E at Answers to Interrogatories 12-14. Due to the failure to respond, this Board should infer that such an agreement does in fact exist and that a contractual obligation precludes the University from either producing a sports drink like the one developed by Applicant or licensing COWBOYS for use in connection with a sports drink. Thus, Opposer cannot expand its use of the word “cowboys” into the same channels as that of the Applicant’s sports drinks. Such agreements are commonplace in the national soft drink market and the existence of such an agreement, which Opposer has not denied, is at minimum a material question of fact on a key *du Pont* factor.

**III. Argument**

A. Summary Judgment Standard

A party moving for summary judgment bears the burden of demonstrating the absence of any

genuine issue of material fact, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *SRI Int'l v. Matsushita Elec. Corp. of Am.* 775 F.2d 1107, 1116 (Fed. Cir. 1985). A material fact is one that may affect the decision, whereby the finding of that fact is relevant and necessary to the proceedings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists if sufficient evidence is produced that a reasonable fact finder could decide the question in favor of the non-moving party. *Opryland USA Inc. v. Great American Music Show, Inc.* 970 F.2d 847, 850 (Fed. Cir. 1992).

A party bringing a motion for summary judgment in a trademark proceeding based upon likelihood of confusion must establish that there is no genuine dispute “that contemporaneous use of the [marks] by the parties, for their respective [goods and] services, would be likely to cause confusion, mistake or to deceive consumers.” *Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ 1733, 1735 (TTAB 2001). The moving party must demonstrate more than a theoretical possibility of confusion; a substantial likelihood of confusion is the appropriate legal standard. *Bongrain Int'l (American) Corp. v. Delice de France, Inc.*, 811 F.2d 1479, 1486 (Fed. Cir. 1987); *see also A&H Sportswear v. Victoria's Secret, Inc.*, 166 F.3d 197 (3d Cir. 1999).

In opposition proceedings, determination of likelihood of confusion is the ultimate legal conclusion based on findings of fact for each pertinent *du Pont* factor considered together. *Old Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 202 (Fed. Cir. 1992). In deciding a motion for summary judgment, the evidentiary record, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the non-moving party. *Univ. Book Store v. Univ. of Wisc. Bd. of Regents*, 33 USPQ2d 1385, 1389 (TTAB 1994). The non-moving party “need only present evidence from which a [fact finder] might return a verdict in [its] favor.” *Copelands' Enters., Inc. v. CNV, Inc.* 945 F.2d 1563, 1566 (Fed. Cir. 1991).

B. Summary Judgment Standard Applied to *du Pont* Factors

(1) *Similarity of the Marks.* In deciding whether two marks are similar or dissimilar, “all

relevant facts pertaining to appearance, sound, and connotation must be considered.” *Packard Press, Inc. v. Hewlett Packard Co.*, 227 F.3d 1352, 1357 (Fed. Cir. 2000). In cases where “one of two similar marks is commonly paired with other material, that pairing will serve to lessen any confusion that might otherwise be caused by the textual similarity between the two marks.” *CareFirst of Maryland, Inc. v. First Care, P.C.*, 434 F.3d 263, 271 (4<sup>th</sup> Cir. 2006). Thus, undisputed evidence that a word is commonly paired with other indicia creates a genuine issue of material fact as to the similarity of the word as used by Opposer and Applicant’s mark.

(2) *Relatedness of the Goods.* Furthermore, there is no per se rule that goods are related simply because two marks are used in connection with food or drink products. To the contrary, “each case must be decided on the basis of all relevant facts which include the marks and the goods as well as the marketing environment in which a purchaser normally encounters them.” *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 928 (C.C.P.A. 1978).

(3) *Fame of the Mark and Third Party Use of Similar Marks on Similar Goods.* It is also well settled that fame alone cannot overwhelm the other *du Pont* factors as a matter of law. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 1374 (Fed. Cir. 1983). Moreover, evidence of third party use of the same word on similar products is a factor that must be considered in determining likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973). Evidence of third party use that could reasonably support an inference that a mark is weak therefore creates a genuine issue of material fact. *Old Tyme Foods*, 961 F.2d at 204.

(4) *Other Relevant Facts – Intent of the Applicant.* Finally, certain factual questions in likelihood of confusion cases are generally unsuitable for disposition on summary judgment. See *Copelands*, 945 F.2d at 1567 (“As a general rule, the factual question of intent is particularly unsuited to a disposition on summary judgment.”); *Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ 1503 (TTAB 1993).

C. Material Facts in Dispute Under the *du Pont* Factors

(1) *The commercial impression of COWBOYADE is clearly distinct from that of Opposer's marks.*

For the purposes of determining likelihood of confusion, allegedly similar trademarks must be considered in their entirety and not dissected into their component parts. *In re National Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). Similarly, “all relevant facts pertaining to appearance, sound, and connotation must be considered before similarity as to one or more of those factors may be sufficient to support a finding that the marks are similar or dissimilar.” *Packard Press*, 227 F.3d 1357 (citations omitted). Accordingly, one mark’s distinct commercial impression can preclude a finding of likelihood of confusion despite apparent similarities between the two marks. “Because the likelihood of confusion analysis looks to the actual use of competing marks, a comparison of the texts of the two marks alone is insufficient if the marks have different appearances in the marketplace.” *CareFirst*, 434 F.3d at 271 (further holding that in cases where “one of two similar marks is commonly paired with other material, that pairing will serve to lessen any confusion that might otherwise be caused by the textual similarity between the two marks.”).

It is undisputed that Opposer uses “cowboys” together with the University’s other indicia: its distinctive orange-and-black color scheme, the stylized “OSU” logo, the words “Oklahoma State” and/or depictions of Pistol Pete. *See* Pritchard Dec., Ex. B, OSU 00024-OSU 00025. In fact, none of Opposer’s federally registered marks use the word “cowboy”. Instead, they are only stylized cowboy caricatures, affectionately referred to by the University as Pistol Pete. Furthermore, the University, in cooperation with the CLC, adheres to strict brand management guidelines that do not provide for the formation of composite word marks such as COWBOYADE. *See id.* at OSU 00024-00025 and 00041-00105. Considering Opposer’s marks in context, and use of the word “cowboys” as they appear in the marketplace, it is clear they create a commercial impression that is distinct from the impression created by Applicant’s COWBOYADE.

Exhibits purporting to establish the use of Opposer's marks in connection with food and drink products are representative of the commercial impression of Opposer's marks as they appear in the marketplace. *See* Drucker Dec. Ex. A; Mason Dec. Ex. L, attached to Opposer's brief. In each of these exhibits, "cowboy" appears only in conjunction with indicia of the University, or does not appear at all. *See* Drucker Dec., Ex. A. This aggregation of indicia is a characteristic common to many – if not all – mascots, precisely because the same animal, character, or symbol so often serves as a mascot for so many distinct entities concurrently.

Any potential likelihood of confusion is further reduced by the fact that in the majority of cases the accompanying indicia are themselves registered marks of Opposer. *See CareFirst*, 434 F.3d at 271. Opposer cannot contend that COWBOYADE is likely to cause confusion with the University's registered marks since none of its registrations are for "cowboys". The only possible source of confusion is the superficial similarity between Applicant's COWBOYADE and Opposer's use of "cowboys" next to its registered marks or University indicia. Opposer's claim that COWBOYADE should be compared in the abstract to its own marks not only ignores the realities of the marketplace and the principles of trademark law, it also discounts the source-identifying function of its marks, its distinctive color scheme, and its association with the state of Oklahoma.

***(2) Relevant consumers are not likely to believe that applicant's COWBOYADE is produced by, licensed from, or endorsed by Opposer.***

It is undisputed that Opposer's use of its marks is primarily in connection with its athletic goods and services. *See* Mason Dec. ¶ 10. None of Opposer's marks are registered in international class 32 in connection with non-alcoholic drinks and/or juices. Although Opposer's federal registrations do not limit the scope of its protection to those classes in which it is registered (*see* 15 U.S.C. §1112), the University does not purport to be the producer of any food and drink products, nor would relevant consumers be likely to assume that the University was the ultimate source of any food and drink products bearing the COWBOYADE mark. Opposer's theory of relatedness has its

basis in the University's licensing program, which it describes as "extensive" and applicable to "a wide variety of goods, including food and beverage products." Drucker Dec. ¶¶ 2-3, Ex. A; Mason Dec. ¶ 14.

To date, Opposer has produced no evidence that it has ever licensed "cowboy" in connection with a sports drink. Opposer has not put forth a declaration from even one producer or manufacturer of the purportedly licensed goods, to verify that same have actually been made and sold. Opposer's legal counsel concedes that at best the licensing of food and drink products represents but a fraction of the University's total licensing revenue, the majority of which is derived from apparel. Pritchard Dec. Ex. G, Drucker Dep. 19:19-22; 27. In its motion for summary judgment, Opposer submitted many examples of licensed goods bearing its marks. Drucker Dec. Ex. A.; Mason Dec. Ex. L. Of these, 13 were related to food or drink products, including potato chips, sauces, an energy drink, water, Budweiser® beer, and Dr. Pepper® soft drink. The majority of licensed products were apparel. *Id.*

Opposer's few examples of licensed food and drink products incorporate the word "cowboys" in conjunction with University indicia. For example, the "Cowboy Kick" energy drink not only has the Pistol Pete cowboy, it also expressly reads Oklahoma State on the top and bottom of the can. The "H2" water only bears the initials "OSU" and contains no references to a cowboy. The Dr. Pepper® soft drink cans only contain the Pistol Pete cowboy, and the box for what is presumably a case of Dr. Pepper® has the Pistol Pete cowboy and the initials "OSU" as well. This is not surprising because had the University sold an energy drink, for example, bearing only the word "cowboys" without any other indicia, a consumer would not know if this was an energy drink produced or sponsored by Oklahoma State, the University of Wyoming, the Dallas Cowboys National Football League team or some other entity wholly unaffiliated with the University.

In light of this shortcoming, Opposer places great emphasis on the Board's holding in *DC Comics v. Pan Am. Grain Mfg. Co.* that "goods can be related in the mind of the consuming public as



to the origin of the goods ... [e]ven if the goods are different from, and thus not related to, one another in kind.” 77 U.S.P.Q.2d 1220, 1226 (TTAB 2005). Even assuming that the University could conceivably license a sports drink such as Applicant’s, Opposer must still demonstrate that consumers are likely to perceive that Applicant’s COWBOYADE is endorsed by or otherwise affiliated with the University. To do so would be to grant Opposer exclusive rights in the word “cowboys” for all products and services, regardless of source or affiliation. *See Morgan Creek Prods., Inc. v. Foria Int’l, Inc.*, 91 U.S.P.Q.2d 1134, 1143 (TTAB 2009) (holding that opposer’s position that all goods sold in a mall were related “would essentially give it a right in gross, something that the trademark law prohibits.”). This is contrary to trademark law and inconsistent with the otherwise wide spread third-party use of cowboys as mascots.

Opposer has thus failed to establish that the word “cowboy” in isolation is linked with the University in the minds of relevant consumers, and if COWBOYADE is not perceived as an indicia of University affiliation, there can be no potential for confusion. Even in the unlikely event that consumers tended to focus on the portion “cowboy” of applicant’s mark, a proposition for which there is absolutely no evidence in the record, there is scant possibility of confusion, to say nothing of likelihood, owing to the widespread usage of the word “cowboy” in a variety of contexts. Unlike a fanciful or coined word that can only be reasonably identified with one particular source, the word “cowboy” is ubiquitous in the realm of sports mascots. *Cf. DC Comics* 77 U.S.P.Q.2d 1220 (finding that the coined word “KRYPTONITE” was an unmistakable indicia of the Superman mythos). Accordingly, Applicant’s COWBOYADE fails to create any perception of endorsement or affiliation with the University.

**(3) *Opposer’s established trade channels are distinctly different than Applicant’s.***

The channels of trade between Opposer’s goods and services and Applicants goods and services sold under the COWBOYADE mark will have little to no overlap. The CLC specifically limits distribution of licensed goods to channels in which consumers “have an expectation when they

shop in those channels that they're something that's legitimate. So the way we license and authorize companies to sell I think plays into that [quality control]." Pritchard Dec. Ex. G, Drucker Dep. 66:21-25. Absent some showing that Applicant will have access to these restricted trade channels, there is no reason to believe that its trade channels are confusingly similar to Opposer's. It is likewise undisputed that Applicant sells primarily to distributors and wholesalers, and that the vast majority of its products distributed through institutional channels are targeted to the K-12 and pre-K markets. *See* Pritchard Dec. Ex. C, Harris Dep. 9:22-23; 10:12-18. Moreover, Applicant testified that "colleges and universities . . . [are] not a market for us" because colleges and universities are commonly parties to exclusivity contracts with national drink companies. *See* Ralls Dec., Ex. G 9:14-23.

Not only does Applicant lack access to Opposer's trade channels and the incentive to target those markets, it is generally recognized that there is no "under the same roof" rule under this factor or the relatedness of the goods factor analyzed above. *See generally* 4 J. McCarthy, *Trademarks and Unfair Competition* §24:45; §24:53.50 (4<sup>th</sup> ed. 2009). Although unlikely, assuming that Applicant's goods were to be sold in the same retail outlet as Opposer's, the mere existence of such an environment is not sufficient to conclude that there is a likelihood of confusion. *Federated Foods, Inc. v. Ft. Howard Paper Co.* 192 U.S.P.Q. 24, 29 (C.C.P.A. 1976). Similarly, the fact that both Opposer's and Applicant's goods may be distributed via the Internet "is not a sufficient basis to find that they are sold through the same channels of trade. The Internet is such a pervasive medium that virtually everything is advertised and sold through the Internet." *Parfums de Coeur, Ltd. v. Lory Lazarus*, 83 U.S.P.Q.2d 1012, 1021 (TTAB 2007). At a minimum, there exists a material question of fact as to the extent of the overlap between Opposer's trade channels and those of the Applicant. However, the only interpretation consistent with all of the undisputed facts is that any presumption as to overlapping trade channels is overcome by Opposer's practice of restricting sales to specific channels and the nature of Applicant's established distribution channels that will rarely, if ever,

overlap with Opposer's.

Finally, Opposer's refusal to respond to Applicant's interrogatories regarding the existence of an agreement with national sports drink manufacturers creates a material question of fact as to whether the University is precluded from entering the normal channels of trade for sports drinks. *See* Pritchard Dec. Ex. E "Interrogatories 12-14"; *see also id.* Ex. G, Drucker Dep. 34:3-7 ("There are some, I believe, agreements on campus that would preclude the licensing of certain things for retail sale other than to companies that the school deals with, [i.e., national drink manufacturers]."). In light of the Opposer's refusal to respond, an inference should be drawn that Opposer is precluded from entering the sports drink market, and thus, there can be no potential confusion as to sponsorship or source.

**(4) *Relevant consumers are sophisticated to the extent that they are able to distinguish between officially licensed products and those that are not officially licensed.***

Although sports drinks can arguably be classified as inexpensive impulse items, it does not follow that the relevant purchasers for the instant proceeding are unsophisticated. If Applicant's mark is a triggering mechanism for the sale of the product, as Opposer claims, then the potential for confusion as to the source or sponsorship of the COWBOYADE would presumably be greatest among those consumers who are students, fans, and alumni of the University. These same consumers are ostensibly those "who would prefer an officially sponsored or licensed product to an identical non-licensed product" and "assume that products bearing the mark of a school or a sports team are sponsored or licensed by the school or team." Opposer's brief p.16. (citations omitted). Yet it is the undisputed testimony of the CLC's representative that "the fan's knowledge and consumer knowledge of what to look for when they're looking for their particular school's products is pretty clear to them." Pritchard Dec. Ex. G, Drucker Dep. 50:14-17. Furthermore, the CLC actively promotes the fact that it labels all licensed merchandise with a distinctive hologram in the hopes that consumers will check for the hologram and have confidence that they are purchasing an officially

licensed product. *Id.* 67:1-4;18-24. Although classifying its principal customers as unsophisticated impulse shoppers is clearly advantageous to Opposer's theory of the case, this assertion is belied by the testimony of the University's own representative and by the University's continued participation in an official licensing program administered by the CLC.

**(5) *Opposer has failed to establish that its marks are famous.***

In its attempt to demonstrate the fame of its marks, Opposer deliberately and misleadingly conflates "cowboys" with the University's indicia, for example the registered Pistol Pete mark. This cumulative "fame of one equals fame of all" approach is neither consistent with trademark law nor in keeping with the Board's clear guidance that in view of the extreme deference accorded to a famous mark and the legal protection it receives, "[i]t is the duty of a party asserting that its mark is famous to clearly prove it." *Leading Jewelers Guild, Inc. v. LJOW Holdings LLC*, 82 U.S.P.Q.2d 1901, 1904 (TTAB 2007). A party attempting to establish the fame of its marks bears the burden of providing a clear basis on which to dissociate the product mark from other indicia that might account for its recognition among relevant consumers. *See Bose Corp. v. QSC Audio Prods., Inc.* 293 F.3d 1367, 1374 (Fed. Cir. 2002). Accordingly, Opposer's transparent attempt to isolate the word "cowboy" from other University indicia and the Pistol Pete caricature for the purposes of similarity analysis while relying on the full complement of its indicia for the purposes of establishing fame should be regarded with considerable skepticism.

Opposer's evidence relating to the fame of its marks fails to establish what portion of that fame is attributable to the word "cowboys" as opposed to "OSU" or Pistol Pete, or what percentage of its licensing revenue is accounted for by using the word "cowboys". As the Board has indicated, substantial advertising expenditures and licensing revenues are not dispositive of the fame factor, particularly when a clear relationship between the figures cited and the mark at issue is not identified. *See CareFirst of Maryland, Inc. v. FirstHealth of the Carolinas, Inc.*, 77 U.S.P.Q.2d 1492 (TTAB 2005); *accord Fort James Operating Co. v. Royal Paper Converting, Inc.*, 83 U.S.P.Q.2d 1624, 2007

TTAB LEXIS 61, at \*10 (TTAB May 21, 2007) (finding Opposer's marks not famous "in the absence of significant advertising and promotional materials which *independently* feature [the] marks.") (emphasis added).

Furthermore, promotional materials of limited circulation or directed to a limited audience are of limited relevance in the determination of a mark's fame. See *Blue Man Prods. Inc. v. Tarmann*, 75 U.S.P.Q.2d 1811 (TTAB 2005). Many of the advertising and promotional materials bearing Opposer's mark are clearly intended for a limited audience. See, e.g., Mason Dec. Ex. F at 20- ("1990 Football Media Guide"). A closer examination of Opposer's evidence of "unsolicited" media coverage likewise reveals that it is frequently anything but. In the few instances that publications referencing the "Cowboys", the word is always used in connection with "Oklahoma State". See, e.g., Ralls Dec. Ex. H. This is not surprising because an without more, one would not know if the article was referring to the University of Wymoning, Hadin-Simmons University, McNeese State University, New Mexico Highlands University or some other school or entity that uses a cowboy as a mascot.

**(6) *Extensive third party use of "Cowboys" on similar goods and services greatly weakens Opposer's claim to exclusive rights in the word "Cowboys".***

Significantly, Opposer's motion for summary judgment avoids analysis of this *du Pont* Factor altogether. This omission is particularly telling in light of Board's requirement "to consider each factor for which it has evidence." *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001). Given Opposer's admission that at least four other colleges or universities use "cowboys" as a mascot, not to mention several high schools, it is difficult to see how this factor can be deemed irrelevant by the University. See Pritchard Dec. Ex. F "Requests for Admission 4 and 10-15". In fact, the University occasionally plays Wyoming, which, if one relies solely on mascots, would be the Cowboys versus the Cowboys. Mason Dec. Ex. C at 2-3. At a minimum, the abundance of third party use of the word "cowboys" on directly competing goods and services

(educational services and intercollegiate athletics) and even schools who directly compete on Oklahoma State's athletic field raises a material question of fact as to the likelihood of confusion. This undisputed concurrent third party use clearly demonstrates the ubiquitous nature of cowboys mascots as well as consumers' ability to distinguish products having "cowboys" on the product.

Not only is Opposer well aware of this profusion of concurrent third-party use, but its legal counsel expressed his confidence in the University's ability to distinguish itself amongst schools having identical mascots. "[I]t could be a mascot, it could be colors, it could be where the product is sold. We look at a number of things to figure context out if we do run into issues like that." *See* Pritchard Dec. Ex. G, Drucker Dep. 51:18-21. The University's ability to differentiate itself from a field of identical mascots associated with identical goods and services is strong evidence that the potential for confusion is practically nonexistent with respect to the use of "cowboy".

Finally, numerous federal registrations incorporating the word "cowboys" on products that could conceivably be licensed by the University (e.g., food, energy drinks, soft drinks, restaurants) are yet another indication that "cowboys" in isolation is not confusingly similar to Opposer's marks used in commerce. *See* Pritchard Dec. Ex. A at SB 001261- 001280. Although Opposer has produced evidence of many purported licensees, it is not immediately evident that any of the third party registrations cited above are owned by parties listed as a licensee of the University. *See* Pritchard Dec. Ex. C at OSU 00026 – 00031. Opposer's evidence resolutely fails to account for the fact that these products are able co-exist in the national market absent a licensing agreement covering the use of the word "cowboy". Taken together, the overwhelming evidence of third party use of marks incorporating the word "cowboy" greatly undermines Opposer's claim that confusion is likely to result from Applicant's registration of COWBOYADE.

***(7) Applicant lacks the intent to trade on the good will and reputation of the Oklahoma State University.***

Throughout its motion for summary judgment, Opposer attempts to portray Applicant's decision to include the word "cowboy" in its mark as irrefutable evidence of its bad faith intent. While it is true that "a strong mark ... casts a long shadow which competitors must avoid," Opposer has not only failed to establish its use of "cowboys" entitles it to any trademark protection in the work, it has failed to establish that Applicant's sports drink directly competes with, or is even related to, its own goods and services. (*Kenner Parker Toys*, 963 F.2d 350, 353 (Fed. Cir. 1992). Finally, it is beyond dispute that "an inference of 'bad faith' requires something more than mere knowledge of a prior similar mark." *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1565 (Fed. Cir. 1987); *accord Playtex Prods., Inc. v. Georgia-Pacific Corp.*, 390 F.3d 158 (2d Cir. 2004) (holding that an inference of bad faith based on knowledge of a senior mark was reversible error). In other words, an Applicant's knowledge of an Opposer's mark is necessary to support a finding of bad faith intent, but it is not sufficient.

Opposer deliberately mischaracterizes Harris's deposition testimony in an attempt to cast doubt on his good faith intent. Opposer's theory of Harris's bad faith is based almost entirely on his use of the word "iconic" to describe the trademarks he chose to market his product, despite Harris' testimony that "iconic" referred simply to "things that people relate to" and that mascots were merely one of a variety of factors considered in developing the trademarks. Pritchard Dec. Ex. D, Harris Dep. 40:16-24; 50:15-20; 57:15-22. A complete reading of Harris's deposition is entirely consistent with his expressed desire to expand upon the initial success of LIONADE and other liquid products by selecting trademarks with broad appeal that resonated with consumers in the national market. The fact that Applicant selected a mark that incorporated the ubiquitous mascot used by the Opposer is not evidence of Applicant's bad faith intent.

Furthermore, there is ample evidence that the market for drinks that incorporate ubiquitous mascot names is a robust one. A search of the registered trademarks that include identifiable mascot names returns a multitude of examples of "bad faith intent" under Opposer's interpretation of that

term: The Bulldog Energy Drink, Panther Energy Drink, Tiger Energy Drink, Cougar Soft Drinks, Spartan, and Cowboy Energy. *See* Pritchard Dec. Ex. A. SB 001261 –001280. In view of these examples, Applicant’s decision to register COWBOYADE in connection with sports drinks is simply inconsistent with an inference of bad faith intent. Only under Opposer’s inflated view of its proprietary rights in the word “cowboy” could a basis for such an inference be found.

In drawing attention to the number of Applicant’s pending trademark applications, Opposer’s reliance on *Nat’l Football League Prop’s, Inc. v. N.J. Giants, Inc.*, and *Chicago Bears Football Club, Inc. v. 12<sup>th</sup> Man/Tenn. LLC* is similarly misplaced. In both of those cases, the defendant/applicant marketed goods — principally apparel — that were identical or closely related to those sold by the trademark owner. Perhaps more importantly, both the defendant and the applicant admitted their intention to target relevant consumers—in those cases, professional football fans. The Board’s declined to find in the latter case that “the adoption [of the similar mark] was in bad faith, particularly in this case, where the adopted mark is not identical to opposer’s marks and “Bears” is the name or nickname of some college football teams.” *Chicago Bears*, 2007 WL 683778 at \*12.

Applicant’s goods are not related to those licensed or sold by the Opposer, nor does the COWBOYADE mark imply the University’s endorsement. Moreover, Opposer’s characterization of Applicant’s intent “to entice students, fans, and alumni of the universities to purchase Applicant’s university-themed sports drinks” finds no support in Harris’s deposition testimony. To the contrary, Harris’s testimony is strong evidence of his intent to steer clear of the indicia of the University, including their distinctive color pairs and their ties to a particular geographic market. *See* Pritchard Dec. Ex. D, Harris Dep. 50: 15-20; 53:1-20; 58:6-9; 59:15-17. At most, Harris’s testimony can be interpreted as targeting those consumers to the extent that they are consumers in the national market for sports drinks, irrespective of their status as fans, students, or alumni of the University. Accordingly, Opposer has failed to establish even a reasonable inference that Applicant possessed the bad faith intent to trade on the good will and reputation of the University.



#### IV. Conclusion

Genuine issues of material fact remain as to at least several key *du Pont* factors, including the similarity of the marks, the relatedness of the goods and trade channels, the fame or strength of Opposer's mark, the contemporaneous use of third party marks, the sophistication of the purchasers and the intent of Applicant in applying for the mark. Summary judgment in the instant proceeding is therefore inappropriate, and Opposer's motion should thus be denied.

Respectfully submitted,

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David G. Oberdick, Esquire

Meyer, Unkovic & Scott LLP  
535 Smithfield Street, Suite 1300  
Pittsburgh, PA 15222  
Telephone: (412) 456-2881  
Facsimile: (412) 456-2864  
E-mail: dgo@muslaw.com.

Attorneys for Applicant,  
Super Bakery, Incorporated

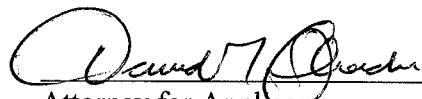
**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

OKLAHOMA STATE UNIVERSITY,	)	Opposition No. 91187908
	)	
Opposer,	)	Application No. 77/383,001
	)	
v.	)	Mark: COWBOYADE
	)	
SUPER BAKERY, INCORPORATED,	)	
	)	
Applicant.	)	

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **APPLICANT'S BRIEF OPPOSING SUMMARY JUDGMENT** was served via First Class Mail, postage prepaid, on this 30<sup>th</sup> day of April, 2010, upon the following:

Rosaleen H. Chou, Esq.  
R. Charles Henn, Jr., Esq.  
Alicia Grahn Jones, Esq.  
KILPATRICK STOCKTON LLP  
1100 Peachtree Street  
Suite 2800  
Atlanta, GA 30309

  
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 Attorney for Applicant